STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 26, 2014
v	No. 314215 Wayne Circuit Court
STEPHEN ANTHONY GUBBINI, Defendant-Appellant.	LC No. 12-004366-FH

Before: MARKEY, P.J., and SAWYER and WILDER, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of fourth-degree fleeing and eluding a police officer, MCL 257.602a(2), and two counts of assaulting, resisting, or obstructing a police officer, MCL 750.81d(1).[1] Defendant was sentenced to two years' probation for each of the three convictions. We affirm.

I. SEARCH AND SEIZURE

Defendant first contends that the trial court erred in denying his motion to suppress the evidence arising out of Officer Thorburn's unlawful seizure and arrest of defendant's car and person because Thorburn did not have a reasonable and articulable suspicion that defendant had violated Michigan law. We disagree.

A. STANDARD OF REVIEW

This Court reviews the underlying factual findings at a suppression hearing for clear error, but reviews the ultimate ruling on a motion to suppress evidence de novo. *People v Williams*, 472 Mich 308, 313; 696 NW2d 636 (2005). "Clear error exists if the reviewing court is left with a definite and firm conviction that a mistake has been made." *People v Johnson*, 466 Mich 491, 497-498; 647 NW2d 480 (2002).

[1] Defendant was acquitted by the jury of one additional count of fleeing and eluding, MCL 259.602a(2), and one additional count of assaulting, resisting, or obstructing a police officer, MCL 750.81d(1).

B. ANALYSIS

Defendant contends that the evidence arising out of Officer James Thorburn's second traffic stop of defendant for a cracked windshield should have been suppressed because the traffic stop was unlawful. Essentially, defendant contends that Thorburn had no lawful right to stop him the second time because Thorburn lacked the reasonable suspicion needed to make an investigative stop, and defendant had a right to resist Thorburn's unlawful "seizure."

Michigan maintains the common-law right to resist an unlawful arrest. *People v Moreno*, 491 Mich 38, 51; 814 NW2d 624 (2012). Under this right, a defendant cannot be convicted for violating MCL 750.81d if his actions in resisting arrest arose out of an unlawful arrest. *Id.* MCL 257.742(1) provides, in pertinent part:

> A police officer who witnesses a person violating [the Michigan vehicle code] or a local ordinance substantially corresponding to this act, which violation is a civil infraction, may stop the person, detain the person temporarily for purposes of making a record of vehicle check, and prepare and subscribe, as soon as possible and as completely as possible, an original and 3 copies of a written citation, which shall be a notice to appear in court for 1 or more civil infractions.

Further, MCL 257.709(1) provides, in pertinent part:

> A person shall not operate a motor vehicle with any of the following:
>
> * * *
>
> (c) An object that obstructs the vision of the driver of the vehicle, except as authorized by law.

At trial, both defendant and Thorburn testified that Thorburn announced to defendant his intent to give defendant a ticket for the crack in his windshield. Thorburn then pulled his police car behind defendant's vehicle, exited his police car, approached defendant's driver's side door, and asked defendant for his driver's license, registration, and proof of insurance. Only after defendant refused Thorburn's lawful request to see defendant's driver's license did Thorburn ask defendant to get out of his vehicle, to which defendant also refused.

Defendant contends that, because the crack in his windshield did not obstruct his view, Thorburn did not have the lawful right to stop defendant and issue a ticket. A traffic stop is valid where a police officer has "an articulable and reasonable suspicion that a vehicle or one of its occupants is subject to seizure for a violation of law." *People v Williams*, 236 Mich App 610, 612; 601 NW2d 138 (1999). Regardless whether the crack in defendant's windshield was sufficient to sustain a civil infraction under the vehicle code, Thorburn had the right to stop and detain defendant when he witnessed what he believed to be a violation of the Michigan vehicle code. MCL 257.742(1); MCL 257.709(1)(c). Thorburn was acting within his lawful duties to stop defendant. Defendant was not asked to get out of his vehicle until after he refused Thorburn's requests to provide his driver's license, an act which could be interpreted as obstructing Thorburn from issuing the ticket. MCL 750.81d(1). Defendant's failure to provide his driver's license to Thorburn was the refusal to follow a lawful command, MCL 257.742(1),

and the subsequent arrest arose from defendant's actions in resisting and obstructing Thorburn, MCL 750.81d(1). Thorburn had the legal authority to stop defendant on the basis of reasonable suspicion that defendant violated MCL 257.709(1). Thorburn's attempts to arrest defendant arose out of defendant's failure to follow Thorburn's lawful command to provide his driver's license. Therefore, the traffic stop effectuated by Thorburn did not violate defendant's Fourth Amendment rights against illegal search and seizure, and the trial judge properly denied defendant's motion to suppress.

II. JUDICIAL NOTICE

Defendant next contends that he was denied a fair trial by the trial court's denial of his request for judicial notice of Michigan law. We disagree.

A. STANDARD OF REVIEW

The decision whether to admit evidence is within a trial court's discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). This Court reverses it only where there has been an abuse of discretion. *Id.* "However, the decision frequently involves a preliminary question of law, such as whether a rule of evidence or statute precludes the admission of the evidence. We review questions of law de novo." *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003).

B. ANALYSIS

The trial court's decision not to take judicial notice of Michigan law was harmless error not requiring reversal.

As a general rule, relevant evidence is admissible and irrelevant evidence is inadmissible. MRE 402. Evidence is relevant if it has any tendency to make the existence of a material fact more or less probable than it would be without the evidence. MRE 401. Even if relevant, however, the trial court may choose to exclude evidence if its probative value is substantially outweighed by the danger of misleading the jury. MRE 403.

Taking judicial notice of an adjudicative fact is discretionary, MRE 201(c), but judicial notice of a Michigan statute is conditionally mandatory in this state, MRE 202(b); *American Cas Co v Costello*, 174 Mich App 1, 8; 435 NW2d 760 (1989). Upon request of a party, "a court *shall* take judicial notice," MRE 202(b) (emphasis added), of "the common law, constitutions, and public statutes in force in every state, territory, and jurisdiction of the United States," MRE 202(a). The party requesting judicial notice must: "(1) furnish[] the court sufficient information to enable it to properly comply with the request and (2) . . . give[] each adverse party such notice as the court may require to enable the adverse party to prepare to meet the request." MRE 202(b).

At trial, defense counsel requested that the trial judge take judicial notice of two provisions of the Michigan vehicle code, providing that a cracked windshield is only proscribed if it obstructs the driver's view, MCL 257.709(c), and that the violations of the vehicle code are civil infractions, not felonies or misdemeanors, MCL 257.907. The trial court reasoned that the statutes were not relevant to the case, and therefore, were inadmissible.

Defendant's main theory at trial was that Thorburn was not acting lawfully when he stopped defendant for the second time because the crack in defendant's windshield did not violate the Michigan vehicle code, a violation of the vehicle code is not a misdemeanor or felony, and therefore, cannot give probable cause to enact a search and seizure, and that defendant had the right to resist an unlawful arrest. On this basis, the two provisions of the vehicle code were arguably relevant to defendant's proffered defense. MRE 401. Because the provisions could arguably paint defendant's actions as the lawful resisting of an unlawful arrest more probable, the statutes were admissible. MRE 402.

Because the statutes were relevant to defendant's defense, the trial judge was required to take judicial notice of them upon defendant's request, once defendant "furnishe[d] the court with sufficient information to enable it to properly comply with the request." MRE 303. At trial, defense counsel moved the court to take judicial notice, stating:

> I'm asking the Court to take judicial notice of MCL 257.709, which regulates windshields of windows and very simply provides section one, paren c, a person shall not operate a motor vehicle with any of the following: Subsection c says an object that obstructs the vision of the driver of the vehicle except as authorized by law.
>
> I'm also asking the Court to take judicial notice of MCL 257.907, and essentially that provides that civil infractions are not crimes. And I'm asking the Court to take judicial notice of the Allen Park Municipal Ordinances, and at section 46.33 or 46 dash 33, the [Allen Park] Code adopts the Michigan Vehicle Code by reference.

Thus, defendant provided the trial court with sufficient information to enable the judge to comply with his request. Therefore, the trial judge erred in denying defendant's request to take judicial notice of the two provisions of the Michigan vehicle code. MRE 202.

Because the trial court erred in denying defendant's request to take judicial notice of the provisions of the Michigan vehicle code, this Court must next determine whether the court's error requires reversal of defendant's convictions. MCL 769.26; MCR 2.613(A); *Lukity*, 460 Mich at 491. MCL 769.26 provides:

> No judgment or verdict shall be set aside or reversed or a new trial be granted by any court of this state in any criminal case, on the ground of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court, after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice.

This statute articulates a "rebuttable presumption of harmlessness." *Lukity*, 460 Mich at 495.

Despite the trial court's denial of defendant's request for judicial notice, defendant's testimony included reference to the fact that the Michigan vehicle code only proscribed objects that actually obstruct a driver's view and that the crack in defendant's windshield did not obstruct defendant's view while driving. Further, defense counsel cross-examined Thorburn

regarding both of the statutory provisions at issue, even getting Thorburn to admit that he did not know whether the Michigan vehicle code required a cracked windshield to actually obstruct the driver's view before a civil infraction could be issued. Therefore, defendant was not harmed by the trial court's denial of defendant's request for judicial notice.

III. JUDICIAL BIAS

Defendant next contends that the trial judge's aggressive questioning of defendant in front of the jury was indicative of judicial bias, and denied defendant his right to a fair trial. We disagree.

A. STANDARD OF REVIEW

In order to preserve an issue of judicial bias, a defendant must raise a claim of judicial bias in the trial court. *People v Jackson*, 292 Mich App 583, 597; 808 NW2d 541 (2011). Because defendant did not raise any claim of judicial bias in the trial court, this issue is unpreserved.

Unpreserved claims of judicial bias are reviewed for plain error. *Id.* "Under the plain error rule, defendants must show that (1) error occurred, (2) the error was plain, i.e., clear or obvious, and (3) the plain error affected a substantial right of the defendant." *People v Pipes*, 475 Mich 267, 279; 715 NW2d 290 (2006). The third element generally requires a showing of prejudice—that the error affected the outcome of the proceedings. *People v Borgne*, 483 Mich 178, 196; 768 NW2d 290 (2009), reh gtd in part on other grounds 485 Mich 868 (2009). Finally, "reversal is only warranted if the defendant is actually innocent or the error seriously undermined the fairness, integrity, or public reputation of the trial." *Pipes*, 475 Mich at 274.

B. ANALYSIS

The trial judge's questioning of defendant did not amount to judicial bias.

"A party that challenges a judge for bias must overcome a heavy presumption of judicial impartiality." *People v Wells*, 238 Mich App 383, 391; 605 NW2d 374 (1999). A trial judge's comments that are critical of or hostile to a party are ordinarily not supportive of finding bias or partiality. *Id.*

MRE 611(a) provides:

> (a) Control by Court. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

Further, "[t]he court may interrogate witnesses, whether called by itself or by a party." MRE 614(b). But a trial court "must exercise caution and restraint to ensure that its questions are not intimidating, argumentative, prejudicial, unfair, or partial." *People v Weathersby*, 204 Mich App 98, 109; 514 NW2d 493 (1994). The trial court cannot assume the role of the prosecutor "with

advantages unavailable to the prosecution." *Id.*, citing *People v Sterling*, 154 Mich App 223, 230; 397 NW2d 182 (1986).

At trial, the following exchange occurred between the trial judge and defendant, during defendant's testimony:

> *THE COURT:* So he said he's writing you a ticket for a cracked windshield and you said why?
>
> *DEFENDANT:* Correct.
>
> *THE COURT:* Did you have a cracked windshield?
>
> *DEFENDANT:* Yes.
>
> *THE COURT:* Okay. Next question?
>
> *DEFENDANT:* I wanted--
>
> *THE COURT:* That's all I wanted to know. You had a cracked windshield--
>
> *DEFENDANT:* Okay.
>
> *THE COURT:* --and that's what he said he was writing it for. Next question.

The trial judge also inquired whether defendant had read the traffic code, including the provisions involving cracked windshields. Defendant contends that this line of questioning from the trial judge was improper and indicative of judicial bias.

The trial judge's questions were insufficient to "overcome [the] heavy presumption of judicial impartiality." *Wells*, 238 Mich App at 391. The trial judge had the right to interrogate defendant on matters pertinent to the case, MRE 614(b), and to limit defendant's responses to his questions in order to "avoid needless consumption of time," MRE 611(a). The judge's questions were related to whether defendant knew he had a cracked windshield, and the judge only stifled defendant's response when it went beyond the judge's inquiry.

Further, defendant was not the only witness that the trial judge questioned. The trial judge questioned Thorburn, a prosecution witness, on his knowledge of the Michigan vehicle code by asking him if he knew whether a cracked windshield was a violation of the code. On these bases, this Court holds that the judge's interrogation of defendant was insufficient to "overcome a heavy presumption of judicial impartiality." *Wells*, 238 Mich App at 391.

IV. JURY INSTRUCTIONS

Defendant next contends that he was denied his right to a properly instructed jury because of the trial court's denial of defendant's requested instructions. We disagree.

A. STANDARD OF REVIEW

Issues of law arising from jury instructions are reviewed de novo on appeal, but a trial court's determination whether an instruction was applicable to the facts of the case is reviewed for an abuse of discretion. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006). If an applicable jury instruction was not given, the defendant bears the burden of showing that the trial court's failure to give the requested instruction resulted in a miscarriage of justice. *People v Rodriguez*, 463 Mich 466, 473-474; 620 NW2d 13 (2000), quoting *Lukity*, 460 Mich at 495-496. "The defendant's conviction will not be reversed unless, after examining the nature of the error in light of the weight and strength of the untainted evidence, it affirmatively appears that it is more probable than not that the error was outcome determinative." *People v Riddle*, 467 Mich 116, 124-125; 649 NW2d 30 (2002).

B. ANALYSIS

Defendant was not denied the right to a properly instructed jury because of the trial court's refusal to give instructions beyond the standard jury instructions.

A trial court must "properly instruct the jury so that it may correctly and intelligently decide the case." *People v Clark*, 453 Mich 572, 583; 556 NW2d 820 (1996). This Court reviews jury instructions as a whole to determine if the trial court made an error requiring reversal. *People v Kowalski*, 489 Mich 488, 501; 803 NW2d 200 (2011). "The instructions must include all elements of the charged offense[s] and must not exclude material issues, defenses, and theories, if there is evidence to support them." *People v McIntire*, 232 Mich App 71, 115; 591 NW2d 231 (1998), rev'd on other grounds 461 Mich 147 (1999). "[A]n imperfect instruction is not grounds for setting aside a conviction if the instruction fairly presented the issues to be tried and adequately protected the defendant's rights." *Kowalski*, 489 Mich at 501-502 (internal quotation marks omitted).

Prior to the parties' closing arguments, the prosecution and defense counsel discussed the jury instructions that would be read to the jury. After the trial judge stated that he intended to give the standard jury instructions, defense counsel stated that he would like instructions defining "arrests and actions that are not criminal." The trial judge stated that he would maintain his position to read only the standard jury instructions and that he did not know of any special instruction the court would be required to give. The trial judge then proceeded to instruct the jury on the elements of all of the crimes for which defendant was charged and concluded with the following instruction:

> Ladies and gentleman, arrest--an arrest is legal if it is made by an officer for a crime that he reasonably believed was committed in his presence if it was made as soon as reasonably possible afterward.

Reviewing the instructions as a whole, the trial judge did not err in denying defendant's request for a special instruction on unlawful arrests. Defendant's requested instructions included a definition of "arrest" elucidated in *Terry v Ohio*, 392 US 1; 88 S Ct 1868; 20 L Ed 2d 889 (1968), which stated that an arrest occurs when a police officer "has in some way restrained the liberty of a citizen," and a definition of "actions that are not criminal," which stated that making

a prohibited turn and driving with a cracked windshield do not constitute allegations of criminal acts.

The trial judge was only required to give instructions that include all elements of the offenses, material issues, defenses, and theories, if there is evidence to support them. *McIntire*, 232 Mich App at 115. Further, it is error for the trial court to give jury instructions that are misleading. *People v Stephan*, 241 Mich App 482, 495-496; 616 NW2d 188 (2000). A police officer can legally stop a motorist if the officer has "an articulable and reasonable suspicion that a vehicle or one of its occupants is subject to seizure for a violation of the law." *Williams*, 236 Mich App at 612. Defendant's proposed instruction failed to address the general validity of Thorburn's stop of defendant for a cracked windshield, and may have misled the jury to believe that Thorburn did not have the legal authority to effectuate a traffic stop of defendant. Further, the instruction that the trial judge read, "an arrest is legal if it is made by an officer for a crime that he reasonably believed was committed in his presence if it was made as soon as reasonably possible afterward," properly articulated the standard for a legal arrest. The instruction gave the jury the necessary information to determine whether defendant was exercising his common-law right to resist an unlawful arrest. Therefore, the "instruction[s] fairly presented the issues to be tried and adequately protected the defendant's rights." *Kowalski*, 489 Mich at 501-502 (internal quotation marks omitted).

V. INEFFECTIVE ASSISTANCE OF COUNSEL

Finally, defendant contends that his defense counsel was constitutionally ineffective for failing to submit a specific instruction on the right to resist an unlawful arrest. Again, we disagree.

A. STANDARD OF REVIEW

A timely motion for a new trial, raising the issue of ineffective assistance of counsel is sufficient to preserve the issue for appellate review. *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000). Alternatively, a criminal defendant may request a *Ginther* hearing, to make a separate factual record supporting the claim of ineffective assistance of counsel, to preserve the issue for appeal. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). Defendant did not move for a new trial or request a *Ginther* hearing, so the issue is not preserved on appeal.

"Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Generally, the trial court's findings of fact are reviewed for clear error and the questions of constitutional law are reviewed de novo. *Id.* Unpreserved claims of ineffective assistance of counsel can still be reviewed, however, this review is limited to errors apparent on the record below. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004).

B. ANALYSIS

Defense counsel was not ineffective for failing to submit a specific jury instruction on the right to resist an unlawful arrest.

The right to counsel during a criminal trial is guaranteed by both the United States and Michigan Constitutions. US Const, Am VI; Const 1963, art 1, § 20. This right is not merely to any assistance of counsel, but to effective assistance of counsel. *United States v Cronic*, 466 US 648, 654; 104 S Ct 2039; 80 L Ed 2d 657 (1984); *People v Vaughn*, 491 Mich 642, 669; 821 NW2d 288 (2012). This right is substantive in nature, and concentrates on the actual assistance received. *People v Pubrat*, 451 Mich 589, 596; 548 NW2d 595 (1996).

Effective assistance of counsel is presumed and the challenging defendant bears the heavy burden of proving otherwise. *People v Seals*, 285 Mich App 1, 17; 776 NW2d 314 (2009). In order to show ineffectiveness of counsel, a defendant generally must show that: "(1) counsel's performance fell below an objective standard of reasonableness and (2) but for counsel's deficient performance, there is a reasonable probability that the outcome would have been different." *People v Trakhtenberg*, 493 Mich 38, 51; 826 NW2d 136 (2012). This Court will not substitute its judgment for that of trial counsel on matters of strategy, nor will it employ the benefit of hindsight to assess the competence of counsel. *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009). Defense counsel has wide discretion as to matters of trial strategy, because counsel may be required to take calculated risks to win a case. *People v Heft*, 299 Mich App 69, 83; 829 NW2d 266 (2012).

In *Matuszak*, the defendant claimed that he received ineffective assistance of counsel, because his defense counsel "failed to request that the jury be instructed on his defense that the victim consented to the sexual penetration." *Matuszak*, 263 Mich App at 59. This Court held that the defendant's challenge lacked merit because "the jury was instructed that it could not find [the] defendant guilty beyond a reasonable doubt unless it found that the sexual penetration had occurred through force or coercion. This instruction implicitly required the jury to find that the complainant did not consent to sexual intercourse before it could find [the] defendant guilty." *Id.*

In this case, though defense counsel did not submit a specific instruction providing that defendant had a common-law right to resist an unlawful arrest, the instructions to the jury did provide that defendant could not be convicted of fleeing and eluding unless the prosecution proved beyond a reasonable doubt that the officer in question was "in uniform and performing his lawful duties." The instructions on the charge of assaulting, resisting, or obstructing an officer provided that the prosecution had to prove beyond a reasonable doubt that the officer "was a police officer performing his duties at that time." Finally, the instructions provided the applicable definition of a "legal arrest."

In both *Matuszak* and the instant case, despite the lack of a specific instruction, both defendants' had jury instructions that implicitly protected their individual defenses. In this case, defendant could not be convicted unless the officers were acting within their "lawful duties." Further, the jury was instructed on the limits of a legal arrest and could infer from the given instructions whether Thorburn, Albright, and Moore were performing lawful duties. Therefore, because defendant's defense to the crime was preserved, defense counsel's performance did not fall below an objective standard of reasonableness.

Additionally, defendant cannot show prejudice even if defense counsel's performance had been lacking. Even if defendant had submitted a specific instruction on his right to resist an unlawful arrest, the prosecution provided sufficient evidence to show that defendant had

obstructed Thorburn by failing to provide his driver's license or exit his vehicle upon Thorburn's request. Even with an instruction that defendant could resist an unlawful arrest, there was ample evidence that defendant resisted a *lawful* arrest. Therefore, defendant cannot show that there is a reasonable probability that the outcome would have been different had he received the jury instruction. *Trakhtenberg*, 493 Mich at 51.

Affirmed.

/s/ David H. Sawyer
/s/ Kurtis T. Wilder